Supreme Court, U.S.
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No. 91-222

In The

Supreme Court of the United States

October Term, 1991

STATE OF HAWAII,

Petitioner,

vs.

JONATHAN K. KIPI,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. Respondent's Characterization of *Grady v. Corbin* and the Judgment Below Demonstrates that, on its own Terms, *Grady* was Misapplied, and that Review Should Be Granted 1

B. Respondent's Argument Demonstrates More Clearly Than Ever that, if Reversal is Not Counseled By *Grady* Alone, Review Should Be Granted so That *Grady* May Be Reconsidered 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES:

Ashe v. Swenson, 397 U.S. 436 (1970) 5

Blockburger v. United States, 294 U.S. 299 (1932).. *passim*

Grady v. Corbin, 110 S. Ct. 2084 (1990) ..... *passim*

Payne v. Tennessee, 111 S. Ct. 2597 (1991) 4

State v. White, 248 N.J. Super. 515, 591 A.2d 954 (1991) 4, 5

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PETITIONER'S REPLY MEMORANDUM

I. ARGUMENT

A. Respondent's Characterization of *Grady v. Corbin* and the Judgment Below Demonstrates that, on its own Terms, *Grady* was Misapplied, and that Review Should Be Granted.

Respondent's principal reason why review should be denied as to Hawaii's initial claim that the judgment below conflicts on its face with *Grady v. Corbin*, 110 S. Ct. 2084 (1990), rests upon a basic misreading of the Petition. Respondent claims that the State has wrongly read into *Grady* a test for Double Jeopardy claim preclusion set forth in *Blockburger v. United States*, 284 U.S. 299 (1932).

See Resp. Br. at 11, 13. It is obvious that this argument, comprising the heart of the Brief in Opposition, erects a straw man. Petitioner never disputes that the traditional and textually-founded (so far as the Double Jeopardy clause is concerned) *Blockburger* analysis was rejected in *Grady*. *See* Pet. at 4 & n.1, 9-10, 12-15. Indeed, that is a main reason why Petitioner argues, ultimately, that this Court should, if it needs to do so to reverse, reconsider and overrule *Grady* in its entirety. *See id.* at 10-11, 15-21.

Our first point is that the Supreme Court of Hawaii misapplied *Grady*. It is Respondent who misstates the *Grady* rule. Hawaii's claim that *Grady* bars "only those subsequent prosecutions in which the government, to establish an essential element of an offense charged in that prosecution, will prove the entire conduct constituting all the elements of the offense for which he had already been prosecuted" (Pet. at 11) derives from the plain language of *Grady* itself. *See* 110 S. Ct. at 2093 (prosecution barred where government will prove "conduct that constitutes an offense" already tried); *id.* at 2093 n.11 (in converse case, subsequent prosecution barred if in securing initial conviction State has necessarily proved conduct "comprising all of the elements of another offense" not yet prosecuted); *id.* at 2094 (prosecution barred where government will prove "entirety of the conduct that constitutes an offense" already tried). *See also Grady*, 110 S. Ct. at 2103 (Scalia, J., dissenting). *Blockburger*, of course, looks only to the statutory elements involved in the two prosecutions, and not at all to the facts and evidence the prosecution actually intends to present. The Petition does not confuse *Grady* with *Blockburger*. The point of the Petition is that *Grady*, which

abandoned *Blockburger*, by no means leaves the lower courts free to utilize the "same transaction" test; Respondent's brief does not address this claim.

As the Petition proves (Pet. at 12-13 & n.5), the proposed prosecution struck down by the Hawaii courts survives *Grady*, and ought to have been allowed over any Double Jeopardy claim. Respondent quotes the operative language from *Grady* – namely that a later prosecution is barred only if the State "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted" – but then simply fails to apply that language faithfully. *See* Resp. Br. at 11. Thus, Respondent argues that "conduct on the part of Kipi that constitutes the offense of contempt was his act of entering Yamasaki's residence and threatening her and her two housemates." *Id.* at 11-12. This is simply untrue. Such conduct does not constitute a contempt until and unless the other elements, i.e., the existence of a court order; Kipi's knowledge of that order barring him from threatening or otherwise contacting Yamasaki; and Kipi's intentional breach of the order, are proved. Pet. at 12.

Similarly, Respondent is plainly wrong in attempting to prove that the subsequent prosecution fails under the *Grady* corollary. Respondent asserts that, here, " 'the State necessarily has proved the conduct comprising all of the elements of another offense' " (Resp. Br. at 13), but this is just not so. Burglary and terroristic threatening contain elements quite distinct from, and absent in, a prosecution for contempt, and the State's *proof* in the case on review here would have so reflected. *Grady* does not bar such a

prosecution, and this Court should grant the writ here and reverse the judgment.

B. Respondent's Argument Demonstrates More Clearly Than Ever that, if Reversal is Not Counseled By *Grady* Alone, Review Should Be Granted so That *Grady* May Be Reconsidered.

Respondent's own substantial recasting of *Grady* shows that Petitioner is right in urging that the practical and theoretical difficulties in applying and understanding the *Grady* test, combined with the weak historical and doctrinal foundation for it, warrant this Court's reconsideration of the *Grady* rule. Indeed, apart from offering affirmative proof why *Grady* should be revisited, Respondent simply has no answer to the reasons why it is appropriate to reconsider *Grady*. *See* Pet. at 15-17 (quoting *Payne v. Tennessee*, 111 S. Ct. 2597, 2617-18 (1991)).

Respondent virtually concedes that the Supreme Court of Hawaii collapsed the *Grady* rule into the "same transaction" test (*see* Resp. Br. at 15-16), yet seeks to argue that this impermissible expansion of Double Jeopardy protections is justified in light of a state compulsory joinder rule. This argument, however, is factually unfounded and logically untenable. The Hawaii Supreme Court expressly found that joinder was not required by Hawaii law (*see* Pet. App. 8a), and whether such joinder was required or not is wholly irrelevant to whether the Double Jeopardy Clause has any preclusive effect.

Respondent's citation to *State v. White*, 248 N.J. Super. 515, 591 A.2d 954 (1991), only further demonstrates why the petition should be granted. *White* stands for nothing

more than the principle of *issue* preclusion adopted by *Ashe v. Swenson*, 397 U.S. 436 (1970), with which the State has no quarrel. *See* Pet. at 20. Neither *Ashe*, nor *White* have anything to do with this case, where Respondent relies on a novel theory of federally mandated merger and bar to block a criminal prosecution.

Petitioner's request for revisiting *Grady* is appropriate, and the Court should grant certiorari for this added reason.

II. CONCLUSION.

For the reasons above and in the Petition, the Court should grant the writ, and summarily reverse the judgment of the Supreme Court of Hawaii, or set the case for briefing and argument, and thereupon, reverse the judgment entered below.

Dated: Honolulu, Hawaii, September 20, 1991.

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